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# Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code

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# *Nachfrist Was Ist?* Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code

*John C. Duncan, Jr.\**

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## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention")<sup>1</sup> came into existence in 1980 and "established the benchmark for the unification of commercial law in the post-war era."<sup>2</sup> It is generally recognized as the first sales law treaty to be accepted worldwide.<sup>3</sup> The United States ratified the treaty on December 11, 1986.<sup>4</sup> The CISG went into effect on January 1, 1988, among 11 nations.<sup>5</sup> Fifty-seven nations, including most of the major trading states, have ratified the Convention.<sup>6</sup> V. Suzanne Cook notes,

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* S. Treaty Doc. No. 9, 98th Cong., 1st Sess. [hereinafter CISG].

2. Harold S. Burman, *Building on the CISG: International Commercial Law Developments and Trends for the 2000's*, 17 J.L. & COM. 355 (1998). Efforts to unify international commercial law date back to the 1930s, under the initiative of the International Institute for the Unification of Private Law. See CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 4 (1999).

3. See JOSEPH LOOKOFESKY, *UNDERSTANDING THE CISG IN THE USA* 1 (1995); Larry A. DiMatteo, *An International Contract Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, L=(ii)<sup>2</sup>, 23 SYRACUSE J. INT'L L. & COM. 67, 68-69 (1997). For a summary by Professor DiMatteo of the movement towards the international unification of contract law, see *id.* at 75-76.

4. See Burman, *supra* note 2, at 355. According to Burman,

In the period from 1945 to 1970, cross-border harmonization of private law was primarily effective in the areas of international transportation and dispute resolution, the latter resulting in the Hague Conventions on service of process and evidence and the U.N. Convention . . . on foreign arbitral awards. The United States actively entered this process in the mid-1960's, by joining the Hague Conference and UNIDROIT, becoming an active member of UNCITRAL which was established as a body of the U.N. General Assembly, and several years later becoming actively engaged in the resurrected private international law (PIL) process at the Organization of American States.

*Id.*

5. See GILLETTE & WALT, *supra* note 2, at 4; see also Burman, *supra* note 2, at 355.

6. The number of countries adopting the CISG continues to increase. As of August 20, 1999, the following countries are parties to the CISG: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, People's Republic of China, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia. For an updated list of Contracting States, visit <<http://cisgw.law.pace.edu/>

In this time of unprecedented globalization of trade, the [CISG] responds to the need for a uniform sales law with international application and acceptance. When law is at its best, it serves and mirrors the values of society and resolves conflicts in a manner that is consistent with such values and expectations. In the case of CISG, with application in [more than] fifty Contracting States spanning five continents and diverse legal systems and traditions, that is a formidable task.<sup>7</sup>

As business interests in the United States continue to globalize, the importance of familiarity with provisions contained in the CISG will be of greater importance to domestic businesses.<sup>8</sup> The ability of domestic businesses to engage in international commercial activity via electronic commerce ("e-commerce") may also compound problems associated with international commercial disputes.<sup>9</sup> Where the CISG is applicable,<sup>10</sup> domestic businesses must confront the issue of whether the application of the CISG will result in unexpected or unanticipated liability.<sup>11</sup> Even if the CISG is inapplicable (i.e., the CISG

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cisg/countries/cntries.html> (visited Nov. 18, 2000). On the expansion of the number of Contracting States, see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND CISG (1997); JAMES M. KLOTZ & JOHN A. BARRETT, INTERNATIONAL SALES AGREEMENTS: AN ANNOTATED DRAFTING AND NEGOTIATING GUIDE 3 (Int'l ed. 1998); V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 343-44 (1998).

7. Cook, *supra* note 6, at 343-44 (footnotes omitted).

8. See DiMatteo, *supra* note 3, at 69.

9. Some common problems include those found in finding applicable domestic law to apply to a contract, such as characterization, gap, accumulation, and related problems. See Elbi Janse van Vuuren, *Termination of International Commercial Contracts for Breach of Contract: The Provisions of the UNIDROIT Principles of International Commercial Contracts*, 15 ARIZ. J. INT'L & COMP. LAW 583 (1998).

10. Applicability of the CISG is discussed *infra* notes 26-44.

11. See DiMatteo, *supra* note 3, at 68. Professor DiMatteo discusses this issue with respect to a U.S. business person possessing only a working knowledge of the Uniform Commercial Code, but this issue certainly could arise with a U.S. business person unaware of the applicability of the CISG. Another area of concern commented on by Professor DiMatteo is the "ongoing internationalization of contract law." He notes,

The acceptance of generally recognized contract principles, the trend towards economic trade unions, the adoption of international conventions, and the growth of international customary law has lead to the convergence of national legal systems in the area of international contract law. In the long-term, this movement towards international unification and harmonization is likely to reduce transaction costs relating to contract formation. In the short-term, however, it further complicates an already complex international legal regime.

*Id.*

does not apply to a particular contract, or the parties exclude application of the Convention),<sup>12</sup> determining which law to apply in the absence of a choice of law provision is often a complex problem.<sup>13</sup> Where a choice of law provision has been included, more potential problems arise, including that of bias on the part of a court applying its own national law.<sup>14</sup>

Notwithstanding these various problems occurring in international commercial activity, the CISG provides what its drafters intended it to provide—uniform law “a bit” more accessible and predictable than what preceded it.<sup>15</sup> One of the Convention’s more intriguing aspects is its partial amalgamation of common law and civil law principles into one body of law. The incorporation of con-

12. Article 6 provides, “[P]arties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.” CISG, *supra* note 1, art. 6.

13. See van Vuuren, *supra* note 9, at 583; see also Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1123 (1995).

14. See van Vuuren, *supra* note 9, at 584. Professor van Vuuren comments, Most choice of law clauses provide for the application of the domestic law of a specific country to disputes arising from the contract. While domestic law is able to adequately govern and regulate domestic contracts, this is not always the case with contracts with an international [flavor]. International contracts introduce problems unique to their nature, such as the intricacies of goods and money crossing international borders. These contracts also require parties and lawyers of different backgrounds—be it common law, civil law, developed, or developing countries—to meet minds over involved issues and difficult concepts.

*Id.* at 583 (footnotes omitted); see also H. Booyesen, *The International Sale of Goods*, 17 S. AFR. Y.B. INT’L L. 71 (1991–1992); S. VIEJOBUEÑO, PRIVATE INTERNATIONAL LAW RULES RELATING TO THE VALIDITY OF INTERNATIONAL SALES CONTRACTS, 26(2) CILSA 173 (1993).

15. See John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207, 211–12 (1988); Camilla Baasch Andersen, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, 10 PACE INT’L L. REV. 403 (1998). Andersen notes,

As those familiar with the CISG are well aware, the Convention is a *uniform* sales law. This goal of uniformity is presented in the preamble, where it is evident that the drafters intended the Convention to be an adoption of uniform rules governing contracts for the international sale of goods in the interest of removing “legal barriers in international trade” and promoting “the development of international trade.” Uniformity applies throughout the Convention by way of Article 7(1), which states: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”

Andersen, *supra*, at 403–04 (citing CISG, *supra* note 1, at Preamble, art. 7) (footnotes omitted).

fluctuating principles could have rendered the Convention unworkable, a quandary clearly contemplated by its drafters.<sup>16</sup> Camilla Baasch Andersen observed,

[U]niformity does not follow automatically from a proclamation of uniform rules. Uniformity is a difficult goal to achieve, as uniform words do not always ensure uniform results, especially where a Convention is in effect throughout countries with completely differing social, economic, and cultural backgrounds, and perhaps most significantly, different legal systems.<sup>17</sup>

Professor John Honnold commented that a partial reason for the failure of the 1964 Sales Convention was the rejection by common law countries of the use of “untranslatable” civil law concepts.<sup>18</sup> Comparative law is not typically a strong focal point of discussion among American scholars.<sup>19</sup> The endeavor of uniformity requires an avoidance of interpreting international text through the “lenses of domestic law.”<sup>20</sup>

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16. See Andersen, *supra* note 15, at 403–04. Professor Honnold explained in 1988, just after the CISG went into effect,

One may well conclude that this is the end of the story: As our sad-faced realists predicted, international unification *is* impossible. But before we despair, perhaps we should consider the alternatives: “conflicts” rules that are unclear and vary from *forum to forum*; national systems of substantive law expressed in doctrines and languages that, for many of us, are impenetrable. The relevant question is surely this: Is it possible to make law for international trade a bit more accessible and predictable? As the “Sea Bees” say, the impossible takes a little longer: For international sales, as we have seen, it took more than half a century.

Honnold, *supra* note 15, at 207–08. Professor Honnold also reviewed the first 10 years of the Convention in 1998. See John Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181 (1998).

17. Andersen, *supra* note 15, at 404 (footnotes omitted).

18. John Honnold, *The Sales Convention: Background, Status, Application*, 8 J.L. & COM. 1, 3 (1988).

19. See, e.g., E. Allen Farnsworth, *The Concept of “Good Faith” in American Law*, Centro di studie ricerche di diritto comparato e straniero [Center for Comparative and Foreign Law Studies] No. 10 (Rome 1993) (visited Nov. 18, 2000) <<http://www.cnr.it/CRDCS/farnswrt.htm>> (stating that “[c]omparative law has traditionally been the province of European scholars. We of the common law tradition have shown less proficiency at comparative law and have often depended on Europeans . . . for leadership”); Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331 (1998).

20. Honnold, *supra* note 15, at 208.

Just as dangers—and corresponding antidotes<sup>21</sup>—exist in applying uniform international law, such a body of law also offers opportunities for insight into application and potential progress of existing domestic laws. A study of the CISG offers such opportunity for study of the Uniform Commercial Code (“UCC” or “Code”). While the UCC clearly is not a “code” in civil law vocabulary,<sup>22</sup> several works have indicated that some of the UCC’s provisions were derived partially from foreign influence, particularly from German sources.<sup>23</sup> The relative success of the CISG, coupled with globalization and other influences, has led a number of commentators to suggest inclusion of some foreign provisions found in the CISG into the UCC through revision.<sup>24</sup> One particular focus of inclusion by these commentators has centered on the concept of *Nachfrist*, generally meaning “extension,” as it was adopted into the CISG from German civil law.<sup>25</sup>

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21. Professor Honnold offers at least two antidotes to the problems of the “threat” to uniformity caused by viewing law through the lenses of domestic law. The first, he notes, is to look at the uniform law the way that lawyers from other jurisdictions have viewed the international text. *See id.* A second antidote is to view the international legislative history of a particular enactment. *See id.* at 209.

22. *See id.* at 210.

23. *See, e.g.,* James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

24. *See* Schadbach, *supra* note 19; GUIDE TO PRACTICAL APPLICATIONS OF THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Albert H. Kritzer ed., 1994); Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT’L L. REV. 303 (1996); John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT’L LAW. 21 (1984); Richard D. Kearney, *Current Development: Developments in Private International Law*, 81 AM. J. INT’L L. 724 (1987); Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994); Eric C. Schneider, *The Seller’s Right to Cure Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods*, 7 ARIZ. J. INT’L & COMP. L. 69 (1989).

25. The CISG *Nachfrist* provisions are found in Article 47 (available for buyer) and Article 63 (available for seller). CISG, *supra* note 1, arts. 47, 63; *see also* DiMatteo, *supra* note 3, at 77. Article 47 provides as follows:

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

CISG, *supra* note 1, art. 47. Article 63 provides a similar option for sellers. *See* CISG, *supra* note 1, art. 63; Harry M. Flechtner, *Remedies Under the New International Sales Convention*:



This article examines the *Nachfrist* concept as it applies to the CISG and considers its potential application to the UCC. Part II provides an overview of the applicability of the CISG to international sales contracts and compares some of the provisions in the Convention with those found in the UCC. Part III discusses the difference between what constitutes breach under the UCC and the CISG and explains when *Nachfrist* applies to CISG contracts. Part IV takes a closer look at the UCC, considering the need for adding a new provision such as *Nachfrist* and rethinking some of the current mechanics in light of potential incorporation of the *Nachfrist* provision. Part V offers suggestions for inclusion of the *Nachfrist* procedure in light of the reconsideration of these existing provisions.

## II. APPLICABILITY OF THE CISG AND SOME COMPARISONS WITH THE UCC

### *A. Application of the CISG*

For the CISG to apply to an international sale of goods, four important qualifications must be met. First, the parties whose places of business are in different nations must both be from different contracting states.<sup>26</sup> Second, although the CISG applies to the sale of goods, it does not apply to all sales of goods.<sup>27</sup> Under Article 2 of the Convention, the CISG does not apply to the sale of consumer goods;<sup>28</sup> sales by auction;<sup>29</sup> sales on execution or otherwise by au-

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*The Perspective from Article 2 of the UCC*, 8 J.L. & COM. 53, 70-75 (1988) (explaining the influence of the *Nachfrist* concept on the CISG); Schadbach, *supra* note 19, at 350 (asserting that the use of *Nachfrist* is illustrative of appropriate application of comparative law principles).

26. See CISG, *supra* note 1, art. 1; see also KLOTZ & BARRETT, *supra* note 6, at 3. Under section (1)(b) of Article 1, the CISG also applies "when the rules of private international law lead to the application of the law of a Contracting State." CISG, *supra* note 1, art. 1(1)(b). However, Article 95 allows nations to declare a reservation so that (1)(b) of Article 1 does not apply. The United States chose this reservation. See KLOTZ & BARRETT, *supra* note 6, at 5.

27. See KLOTZ & BARRETT, *supra* note 6, at 6; see, e.g., *Parties Unknown*, Oberlandesgericht Köln, 19 U 282/93 (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/941027a3.html>>; Recht der Internationalen Wirtschaft (RIW) 1994, 970, Case 122, Case Law on UNCITRAL Texts (CLOUT), United Nations (visited Nov. 18, 2000) <<http://www.uncitral.org/en-index.htm>> (explaining why an order for a "market analysis" was neither a sale of goods nor a contract for the production of goods).

28. See CISG, *supra* note 1, art. 2(a). These goods are defined as those "bought for personal, family or household use." *Id.*; see also KLOTZ & BARRETT, *supra* note 6, at 6 (noting that "[t]his covers situations where individuals shop on the other side of a nearby international border, shop during trips abroad, or order from foreign order houses"); Michael Kabik,

thority of law;<sup>30</sup> sales of stock, shares, investment securities, negotiable instruments or money;<sup>31</sup> sales of ships, vessels, hovercraft, or aircraft;<sup>32</sup> or sales of electricity.<sup>33</sup> Third, the CISG does not apply where the buyer “undertakes to supply a substantial part of the materials necessary for such manufacture or production.”<sup>34</sup> Moreover, it does not apply where the “preponderant part of the obligations of a party who furnishes the goods consists in the supply of [labor] or other services.”<sup>35</sup> Fourth, the CISG does not apply to several types of questions: the validity of the contract,<sup>36</sup> the effect of property,<sup>37</sup> and liability due to death or personal injury.<sup>38</sup>

The CISG also contains an important provision in Article 6, whereby parties may “opt out” of the application of its provisions or derogate from or vary the effect of its provisions.<sup>39</sup> Cook remarks,

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*Through the Looking-Glass of International Trade in the “Wonderland” of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT’L TAX & BUS. LAW 408 (1992).

29. See CISG, *supra* note 1, art. 2(b).

30. See *id.* art. 2(c).

31. See *id.* art. 2(d).

32. See *id.* art. 2(e).

33. See *id.* art. 2(f).

34. *Id.* art. 3(1). Klotz notes that “[r]his provision applies generally to specialized situations, such as turnkey assembly operations, parent/subsidiary sales (where choice of law is usually not at issue), or specialized border issues, such as the Mexican maquiladora-type industries.” KLOTZ & BARRETT, *supra* note 6, at 7; see also *Parties Unknown*, Supreme Court of Austria, 8 Ob 509/93 (Oct. 27, 1994) (Germany) (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/941027a3.html>>.

35. CISG, *supra* note 1, art. 3(2); see also KLOTZ & BARRETT, *supra* note 6, at 7.

36. According to Klotz and Barrett,

The CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. It is not concerned with “the validity of the contract or of any of its provisions or of any usage,” except as otherwise expressly provided in the CISG. This provision covers circumstances where, for example, domestic law prohibits the sale of specified products (for example, contraband and controlled substances), where a person who is induced to enter a contract by fraud is given special rights and remedies under domestic law . . . to enter into a contract . . . or where issues of agency arise under domestic law.

*Id.* at 8 (footnotes omitted); see also CISG, *supra* note 1, art. 4; Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1 (1993).

37. See KLOTZ & BARRETT, *supra* note 6, at 8; CISG, *supra* note 1, art. 4.

38. See KLOTZ & BARRETT, *supra* note 6, at 9; CISG, *supra* note 1, art. 5.

39. CISG, *supra* note 1, art. 6. Derogating from or varying the effects of the CISG is subject to the provisions in Article 12, which states,

Much to its credit, [the] CISG is a flexible and modern sales law that promotes and respects the freedom of the parties to a sales contract to contractually deviate from its provisions, including the election to opt out of [the] CISG and choose the application of an entirely different body of law. Most U.S. practitioners confronted with the issue are delighted with this choice and generally elect, without any hesitation and little reflection, to apply the familiar and trusted UCC. While the lack of reflection may be misguided, the conclusion may well be appropriate in many instances.<sup>40</sup>

Cook also comments that due to the opt-out provision, "most reported cases have arisen under [the] CISG merely because the parties, or their counsel, failed to consider the application of [the] CISG and arrived at litigating under [the] CISG by default only."<sup>41</sup> An important consideration for drafters of international sales contracts is that, unlike some nations, the United States has adopted the CISG.<sup>42</sup> As a treaty ratified by the federal government, it "outranks" or "trumps" state statutes, such as the UCC.<sup>43</sup> Nonetheless, only two cases interpreting the CISG have arisen in U.S. courts, due to the "apparent reluctance of the result-oriented international business community and international legal practitioners to embrace the Convention because of the unpredictability of law in international sales transactions."<sup>44</sup>

### *B. Comparing the CISG with the UCC*

It seems natural for a U.S. attorney to compare the provisions of the CISG with the more familiar terms of the UCC to establish a

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Any provision of article 11, article 29, or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention.

*Id.* art. 12.

40. Cook, *supra* note 6, at 349 (citations omitted).

41. *Id.* at n.34.

42. See B. Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187, 193 (1988).

43. *Id.*

44. V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 258 (1997). The two cases are *Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995) and *Filanto, SpA v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

point of reference.<sup>45</sup> One concern with this approach is that the UCC as adopted in each state varies slightly, so an attorney will have to recognize contrasting provisions between the state's law and the uniform act, as well as recognize contrasts between the uniform act and the CISG.<sup>46</sup> Klotz warns, "U.S. attorneys examining the CISG for the first time may be lulled by the apparent similarities between UCC Article 2 and the CISG. Although they appear very similar, there are some significant differences between the two."<sup>47</sup> Some of these differences include the following: (1) scope of applicability,<sup>48</sup> (2) Statute of Frauds,<sup>49</sup> (3) contract formation ("battle of the forms"),<sup>50</sup> (4) examination and notice,<sup>51</sup> (5) claims for damages,<sup>52</sup>

45. See Cook, *supra* note 6, at 345.

46. See KLOTZ & BARRETT, *supra* note 6, at 9.

47. *Id.*

48. As noted above, the CISG only excludes certain types of goods from its scope. See *supra* notes 26–38 and accompanying text; see also KLOTZ & BARRETT, *supra* note 6, at 10. "Goods" are defined in the UCC as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid." UCC § 2-105. Under this broad definition, these goods are subject to the UCC, leading to a more inclusive application than the CISG. See KLOTZ & BARRETT, *supra* note 6, at 10.

49. Under the UCC, a contract for the sale of goods over \$500 must be evidenced by a writing and signed by the party against whom enforcement is sought. UCC § 2-201(1). Under CISG, "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." CISG, *supra* note 1, art. 11; see also KLOTZ & BARRETT, *supra* note 6, at 10–11; Cook, *supra* note 6, at 346.

50. Where a contract is formed by exchange of a form purporting to be an offer and a form containing additional or different terms as a purported acceptance, under both the UCC and the CISG a contract is formed but little guidance is offered on the appropriate terms of the agreement. See Cook, *supra* note 6, at 348. Under the UCC, such an acceptance is valid even though it states terms different than or in addition to terms found in the offer, "unless acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1). By contrast, CISG follows the common law "mirror image" rule, under which the presence of different or additional terms means no acceptance occurred. CISG, *supra* note 1, art. 19(1). Instead, the purported acceptance acts as a rejection of an offer and constitutes a counter-offer. *Id.* CISG contains a provision, somewhat like the UCC, under which "a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance," unless the offeror objects without undue delay. *Id.* art 19(2).

51. The UCC requires notice from a buyer within a reasonable amount of time after discovery of a defect in the goods. UCC § 2-607(3)(a). The CISG requires that the buyer must notify the seller of a lack of conformity within a reasonable time after she has discovered or should have discovered it. CISG, *supra* note 1, art. 39(1). Unlike the UCC, however, the CISG provides that "the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee." *Id.* art. 39(2).

(6) warranty disclaimers.<sup>53</sup>

These differences illustrate some of the aspects of which practitioners should be aware. The remainder of this article considers the different treatment of breach of contract in the UCC and the CISG to introduce the concept of *Nachfrist* in the CISG and international law.

### III. PARTIES' RIGHTS IN ANTICIPATION OF BREACH UNDER THE UCC AND THE CISG

When a party anticipates that the seller will breach the contract, provisions in the UCC and the CISG do not differ significantly.<sup>54</sup> Section 2-609 of the UCC allows one party to demand adequate assurance of due performance in the event that reasonable grounds for insecurity exist with respect to performance of the other party.<sup>55</sup> Likewise, under the CISG, "[a] party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations."<sup>56</sup> If the other party gives adequate assurance of performance, the party suspending performance must continue performance.<sup>57</sup> The UCC and the CISG do, however, contain differences with respect to the parties' rights in the event of a potential breach, and the CISG contains a provision (*Nachfrist*) allowing one party, under certain circumstances, to fix an additional period of time for the seller to perform his obligations.<sup>58</sup> The significance of these provisions may be understood by recognizing the differences in what constitutes a breach under the UCC and the CISG.

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52. Klotz explains, "[a]lthough both the CISG and UCC Article 2 allow recovery of foreseeable damages, the CISG includes damages which the party 'ought to have foreseen,' as well as those which were actually foreseen." KLOTZ & BARRETT, *supra* note 6, at 13; *see also* CISG, *supra* note 1, art. 74.

53. Unlike the UCC, CISG does not adhere to any formal requirements to disclaim warranties, such as a "conspicuous" disclaimer of the implied warranty of merchantability that expressly mentions the term "merchantability." UCC § 2-314; CISG, *supra* note 1, art. 35; *see also* Cook, *supra* note 6, at 346-47.

54. Parts IV and V, *infra*, however, explain that the provisions contained in the CISG dealing with prospective nonperformance would add significant options for aggrieved parties and should be considered for inclusion in the revised UCC Article 2.

55. *See* UCC § 2-609; *see also* GILLETTE & WALT, *supra* note 2, at 168-79.

56. CISG, *supra* note 1, art. 71(1).

57. *See id.* art. 71(3).

58. *See id.* arts. 47, 63.

A. *What Constitutes Breach?*1. *Under the Restatement of Contracts*

The Restatement of Contracts, Second, ("Restatement Second") distinguishes between "partial" breach and "total" breach<sup>59</sup> and makes an insignificant change from the common law concepts of "material" and "total" breach.<sup>60</sup> John D. Calamari and Joseph M. Perillo summarize the effect of a "material" breach versus a "total" breach at common law as follows:

If the breach is material, the aggrieved party may cancel the contract. He may sue also for a total breach if he can show that he would have been ready, willing and able to perform but for the breach. However he also has the option of continuing with the contract and suing for a partial breach. If the breach is immaterial, the aggrieved party may not cancel the contract, but he may sue for a partial breach.<sup>61</sup>

Under the Restatement Second, a "material" breach justifies the aggrieved party to suspend his performance.<sup>62</sup> A "total" breach, alternatively, means that the breach justifies the aggrieved party cancelling a contract and entitles him to a claim for damages for the remaining rights of performance.<sup>63</sup>

Restatement Second lists five circumstances to consider in determining whether a failure to perform is "material." These include (1) the extent of the deprivation of a reasonably expected benefit to the aggrieved party; (2) the extent of the deprivation of adequate compensation for part of the benefit the aggrieved party will be deprived; (3) the extent of forfeiture suffered by the party failing to perform; (4) the likelihood the party failing to perform will cure his or her failure; and (5) the extent to which the party failing to perform does or does not comport with the requirement of good faith and fair dealing.<sup>64</sup> Similarly, Restatement Second lists a series of cir-

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59. RESTATEMENT (SECOND) OF CONTRACTS § 236 (1979).

60. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS §§ 11-15, 11-18 (3d ed. 1987).

61. *Id.* § 11-18 (footnotes omitted).

62. *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS §§ 236, 237, 241.

63. See RESTATEMENT (SECOND) OF CONTRACTS § 236; CALAMARI & PERILLO, *supra* note 60, § 11-18.

64. See RESTATEMENT (SECOND) OF CONTRACTS § 241. See also CALAMARI &

cumstances that determine whether there has been a "total" breach.<sup>65</sup>

The so-called antithesis to a material breach is the doctrine of substantial performance, which arises in an exchange of performances in bilateral contracts.<sup>66</sup> It is summarized by one court as follows:

The substantial performance doctrine provides that where a contract is made for an agreed exchange of two performances, one of which is to be rendered first, substantial performance rather than exact, strict or literal performance by the first party of the terms of the contract is adequate to entitle the party to recover on it.<sup>67</sup>

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PERILLO, *supra* note 60, § 11-18, who list the following factors as significant with respect to whether a breach is material:

1) to what extent, if any, the contract has been performed at the time of the breach. The earlier the breach the more likely it will be regarded as material. 2) A willful breach is more likely to be regarded as material than a breach caused by negligence or by fortuitous circumstances. 3) A quantitatively serious breach is more likely to be considered material. In addition, the consequences of the determination must be taken into account. The degree of hardship on the breaching party is an important consideration particularly when considered in conjunction with the extent to which the aggrieved party has or will receive a substantial benefit from the promised performance and the adequacy with which he may be compensated for partial breach by damages. Materiality of breach is ordinarily a question of fact.

*Id.* (footnotes omitted).

65. See RESTATEMENT (SECOND) OF CONTRACTS § 243, which states:

§ 243. Effect of a Breach by Non-Performance as Giving Rise to a Claim for Damages for Total Breach

(1) With respect to performances to be exchanged under an exchange of promises, a breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance, other than a duty to render an agreed equivalent under § 240.

(2) Except as stated in Subsection (3), a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach.

(3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

(4) In any case other than those stated in the preceding subsections, a breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.

66. See CALAMARI & PERILLO, *supra* note 60, § 11-18(b).

67. *Brown-Marx Assoc., Ltd., v. Emigrant Sav. Bank*, 703 F.2d 1361, 1367 (11th Cir. 1983); see also CALAMARI & PERILLO, *supra* note 60, § 11-18(b).

Calamari and Perillo note that this doctrine has been applied with particular emphasis in construction contracts.<sup>68</sup> Calamari and Perillo also note that “substantial performance is not full performance and that the party who relies on the doctrine has breached his contract. Consequently, he is liable in damages to the aggrieved party.”<sup>69</sup>

## 2. *The perfect tender rule under the UCC*

An exception to the doctrine of substantial performance occurs in a contract for the sale of goods.<sup>70</sup> Calamari and Perillo comment,

During the nineteenth century, the perfect tender rule developed with respect to contracts for the sale of goods. Under that rule the buyer was free to reject the goods unless the tender conformed in every respect to the contract. This includes not only quantity and quality but also the details of shipment. In the words of Learned Hand, “There is no room in commercial contracts for the doctrine of substantial performance.” The rule has been criticized and is particularly unfair when it is impractical for the seller to resell the rejected goods, for example, because the goods were specially manufactured.<sup>71</sup>

With the exception of installment contracts,<sup>72</sup> the UCC continues to recognize the perfect tender rule noted above, both in Article 2 and in Article 2A covering leases of goods.<sup>73</sup> Under section 2-601, the buyer has the option of (a) rejecting the goods as a whole; (b) accepting the goods as a whole; or (c) “accept[ing] any commercial unit or units and reject[ing] the rest” “if the goods or the tender of delivery fail *in any respect* to conform to the contract.”<sup>74</sup> Commentators have noted that the perfect tender rule has largely been criti-

68. See CALAMARI & PERILLO, *supra* note 60, § 11-18(b).

69. *Id.* (footnotes omitted).

70. See *id.*

71. CALAMARI & PERILLO, *supra* note 60, § 11-20 (citing *Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc.*, 16 F.2d 185 (2d Cir. 1926)).

72. See UCC § 2-612. The provisions in § 2-612 for installment contracts are considered in more detail *infra*, Part IV.B.1.b.

73. See CALAMARI & PERILLO, *supra* note 60, § 11-20. Article 2A's provisions for determining breach by a lessor are identical to that of Article 2. See UCC §§ 2A-509 (perfect tender rule); 2A-510 (breach of installment leases); 2A-523 (lessor's rights in the event of lessee's breach).

74. UCC § 2-601 (emphasis added).



cized and has been in decline since even before the enactment of the UCC.<sup>75</sup> It should also be noted that the perfect tender rule in the UCC is the only section applicable to one-shot contracts.<sup>76</sup>

Even if the buyer rejects the contract, the buyer's rejection under section 2-601 does not necessarily discharge the contract.<sup>77</sup> In two specific situations, the UCC grants the seller a right to cure the non-conformity in the goods or the tender of delivery.<sup>78</sup> First, if the time for performance has not expired and the buyer rejects a tender or rejects goods for nonconformity, the seller retains an unconditional right to cure by making a conforming delivery within the time allowed under the contract.<sup>79</sup> Second,

[w]hen the buyer rejects a non-conforming tender, the seller also has a right to cure after the time for performance has passed if (1) the seller had reasonable grounds to believe that the tender would be accepted "with or without money allowance;" (2) "the seller . . . seasonably notifies the buyer" of his intention to cure and cures the non-conforming tender within "a further reasonable time."<sup>80</sup>

It is particularly important to note that the termination of a contract under the perfect tender rule could result in serious consequences and excessive waste were it to apply in the international sales context.<sup>81</sup> For this reason, the CISG requires a "fundamental" breach to allow avoidance, as opposed to adopting the perfect tender rule found in U.S. commercial law.

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75. See CALAMARI & PERILLO, *supra* note 60, § 11-20; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-3(b) (4th ed. 1995) ("We are skeptical of the real importance of the perfect tender rule. Even before enactment of the Code, the perfect tender rule was in decline, and the Code erodes the rule." (footnotes omitted)); John Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 457 (1949).

76. See WHITE & SUMMERS, *supra* note 75, § 8-3.

77. See CALAMARI & PERILLO, *supra* note 60, § 11-20(a).

78. See *id.* Calamari and Perillo note that, although the buyer loses the right to rejection if the cure takes place before rejection, the buyer retains a right to sue under UCC § 2-714. See *id.* § 11-20, n.8.

79. See *id.* § 11-20(a)(1); UCC § 2-508(1); Note, *Uniform Commercial Code—Sales—Sections 2-508 and 2-608—Limitations on the Perfect Tender Rule*, 69 MICH. L. REV. 130 (1970).

80. CALAMARI & PERILLO, *supra* note 60, § 11-20(a)(2) (footnotes omitted); UCC § 2-508(2).

81. See LOOKOFSKY, *supra* note 3, at 70.

### 3. "Fundamental" breach under the CISG

Under Article 25 of the CISG,

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.<sup>82</sup>

The decisive criterion in whether a breach is fundamental is whether the injury suffered by the aggrieved party is sufficiently substantial, determined in light of the circumstances in each case.<sup>83</sup> Factors may include such considerations as "the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party."<sup>84</sup> This injury must also be foreseeable. The party in breach may prove that she did not see and had no reason to foresee a particular result.

The CISG requires the seller to deliver goods of the same quantity, quality, and description as required by the contract but does not allow avoidance for mere noncompliance.<sup>85</sup> Two key facets of the Convention distinguish the treatment of a breach in international contracts from the treatment under both the Restatement Second and the UCC. First, specific performance under civil law is generally considered the primary remedial measure in the event of a breach.<sup>86</sup> Clear examples can be found under Danish, German, Spanish, and French law, as well as the law of The Netherlands and the law of Louisiana, which has not adopted Article 2 of the UCC.<sup>87</sup> Second, the Convention has adopted a policy to keep a contract intact, a pol-

82. CISG, *supra* note 1, art. 25.

83. See Secretariat of the United Nations, *Secretariat Commentary on Article 23 of the 1978 Draft* [draft counterpart to CISG Article 25] (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-25.html>>.

84. *Id.*

85. See *id.* art. 35.

86. See Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476, 499 (1981); DiMatteo, *supra* note 3, n.38; Jianming Shen, *The Remedy of Requiring Performance Under the CISG and the Relevance of Domestic Rules*, 13 ARIZ. J. INT'L & COMP. L. 253, 256, 280 (1996).

87. See Shen, *supra* note 86, at 280-82.

icy also adopted by the principles of the International Institute for the Unification of Private Law ("UNIDROIT").<sup>88</sup> Accordingly, avoidance of a contract under the CISG is an extraordinary (and powerful) remedy available to parties.<sup>89</sup>

Like the UCC, if the seller delivers goods that are nonconforming, the seller may cure the defect, provided this exercise does not cause the buyer unreasonable inconvenience or unreasonable expense.<sup>90</sup> In the event of a seller's failure to perform any obligation, the buyer has two general options. First, she may exercise rights found in Articles 46 through 52, dealing with curing performance or avoiding the contract.<sup>91</sup> Second, she may claim damages, as provided in Articles 74 through 77.<sup>92</sup> With respect to the first option, the buyer may declare the contract avoided if the seller's failure to perform any obligation amounts to a fundamental breach, as defined in Article 25, quoted above.<sup>93</sup> The buyer may also avoid if, in the case of nondelivery of goods, the seller does not deliver the goods within an additional period of time fixed by the buyer, the *Nachfrist* notice.<sup>94</sup>

The seller's right to avoid the contract is similar to that of the buyer's. The seller may avoid the contract if a breach by the buyer is fundamental, even though the buyer may have taken possession of the goods.<sup>95</sup> The seller may extend the additional period of time un-

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88. The policy of keeping a contract intact appears partially founded on the civil law approach to specific performance and partially on the nature of international contracts in general, that is, negating the need for judicial intervention in the event of a breach. See Perillo, *supra* note 24, at 303. Professor Perillo explains,

Like CISG, [the UNIDROIT Principles adopt] a policy of keeping the contract intact if at all feasible. It does this by its emphasis on cure, adoption of the *Nachfrist* procedure, and by placing limitations on the power of an aggrieved party to cancel the contract because of breach by the other. The cure provisions are similar to Articles 37 and 48 of CISG.

*Id.* (footnotes omitted); see also INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [*hereinafter* Principles].

89. See Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT'L & COMP. L. REV. 279 (1997).

90. See CISG, *supra* note 1, art. 37.

91. See *id.* art. 45.

92. See *id.*

93. See *id.* art. 49; see also *supra* note 82 and accompanying text.

94. See *id.* arts. 46, 49.

95. See *id.* art. 64(1)(a); Gabriel, *supra* note 89, at 297.

der Article 63, during which the buyer must perform his obligations to pay the contract price or to take delivery of the goods.<sup>96</sup> The seller may avoid if the buyer fails to pay the price or take delivery of the goods during the *Nachfrist* period.<sup>97</sup> Article 64(1)(b) is limited to situations in which the *Nachfrist* notice fixed a period of time for the buyer to pay the price or to take delivery of the goods.<sup>98</sup>

### B. Fixing Additional Time: *Nachfrist*

#### 1. The parties' dilemma in the CISG

The preceding section sets forth two instances where avoidance is available to a party under the CISG—where a fundamental breach has occurred or where one party has failed to comply with the other's *Nachfrist* notice. The requirement of fundamental breach causes a peculiar dilemma for the buyer in the case of delay by the seller. Should the buyer wait for performance until the point that the breach by the seller has become fundamental? If the buyer does wait until the breach has become fundamental, has the buyer failed to mitigate damages caused by the delay, as is required in Article 77?<sup>99</sup> Since reasonable minds will often differ as to whether the threshold for fundamental breach has occurred, the *Nachfrist* notice is a powerful option available to a party anticipating breach. An example will illustrate the dilemma caused by the requirement of fundamental breach and illustrate, in part, the power of the *Nachfrist* notice in a contract governed by the Convention.<sup>100</sup>

96. See CISG, *supra* note 1, arts. 63, 64(1)(b); Gabriel, *supra* note 89, at 297.

97. See CISG, *supra* note 1, art. 64(1)(b); Gabriel, *supra* note 89, at 297.

98. See CISG, *supra* note 1, art. 64(1)(b); Gabriel, *supra* note 89, at 297. Article 49, which permits avoidance for the buyer, is similarly limited to cases of nondelivery by the seller. CISG, *supra* note 1, art. 49(1)(b).

99. See CISG, *supra* note 1, art. 77.

100. Both the CISG and the UNIDROIT Principles contain *Nachfrist* provisions that are almost identical, although the provision contained in the Principles appears more detailed textually. See Principles, *supra*, note 88, art. 7.1.5; Perillo, *supra* note 24, at 303–04. Article 7.1.5 of the Principles provides as follows:

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not

Experimental Transportation, Inc., of Los Angeles designed an all-terrain vehicle for rugged hill country travel (called the "Clod Jumper") and agreed to sell one for \$30,000 to Dingo Ranch of Australia. Neither party was willing to be bound by the laws of the other's country, so they agreed to adopt the law of the CISG. Experimental Transportation was supposed to deliver the Clod Jumper by December 1, but it had problems with Customs and that date came and went with no activity. Dingo Ranch sent a letter to Experimental Transportation proposing that the date of delivery be moved to February 1.<sup>101</sup>

Though this example is relatively straightforward, it illustrates the basic concern for including such a notice in a contract governed by the CISG. A delay due to a problem caused with customs is not likely a fundamental breach. In the absence of fundamental breach, Dingo Ranch has some options but cannot avoid the contract without using the *Nachfrist* notice.<sup>102</sup> Moreover, each of Dingo's potential options are fraught with uncertainty. Article 71, which permits a party to suspend performance, is applicable only where the suspension was caused by either "a serious deficiency in his ability to perform or in his creditworthiness," or a party's "conduct in preparing to perform or in performing the contract."<sup>103</sup> Even if this were applicable to the example above, the seller would still have the right to provide adequate assurance of his performance.<sup>104</sup> Other provisions

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been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of the period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

101. This example was provided in DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON COMMERCIAL LAW 276 (3d ed. 1993). Professor Whaley's questions directed at students have been omitted.

102. See CISG, *supra* note 1, art. 49.

103. *Id.* art. 71(1)(a), (b).

104. See *id.* art. 71(3). Under the UCC, Dingo's options would likewise be limited to seeking adequate assurance of performance under section 2-609, assuming Dingo would not seek to terminate the contract due to repudiation by Experimental Transportation. See UCC § 2-610. Unlike the CISG, Dingo would have no need for concern over whether Experimental Transportation's delay amounted to a breach, since the perfect tender rule, described in Part

of Chapter 5 of the Convention are limited to instances where the breach has become fundamental.<sup>105</sup> The *Nachfrist* option not only adds a considerable amount of certainty for Dingo Ranch as to the performance by the other party but also serves as a self-help remedy by obviating judicial intervention.<sup>106</sup>

## 2. The *Nachfrist* procedure under Articles 47 and 63

*a. Fixing additional time.* Both the buyer and the seller may fix additional time for the other party to perform obligations, irrespective of whether the obligation is basic or ancillary.<sup>107</sup> For the buyer, the additional period may be applied for the seller to deliver, supply substitute goods in the case of nonconformity with the contract,<sup>108</sup> repair nonconforming goods,<sup>109</sup> deliver necessary documents,<sup>110</sup> or perform other acts in the contract, such as assembly of the goods.<sup>111</sup> For the seller, the additional period may be applied for the buyer to perform acts required to enable the seller to make the delivery,<sup>112</sup> to take over the goods,<sup>113</sup> or to pay the price for the goods.<sup>114</sup>

*b. Demanding performance within a reasonable period of time.* When the buyer or seller fixes the additional period, the party fixing

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III.A.2, *supra*, would apply to this transaction. Were this contract an installment contract, on the other hand, the threshold for breach would be higher (i.e., the delay substantially impaired either the installment or the whole contract), then Dingo's concerns about the standard for breach would be similar to that in this example. See UCC § 2-612. Parts IV and V, *infra*, suggest that substantial impairment should be the standard for all breaches in the UCC and that *Nachfrist* should be a procedure available to aggrieved parties in the event of delay in delivery or payment.

105. See, e.g., *id.* arts. 72 (allowing a party to avoid a contract if "it is clear" that one party will commit a fundamental breach), 75 (permitting cover damages where the contract is avoided), 76 (permitting expectation damages where the contract is avoided).

106. See *infra* notes 156–70 and accompanying text, commenting about the use of *Nachfrist* in the UCC as a self-help provision.

107. See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 395 (Geoffrey Thomas, trans., Clarendon Press 2d ed., 1998).

108. See *id.* art. 46(2).

109. See *id.* art. 46(3).

110. See SCHLECHTRIEM, *supra* note 107, at 395.

111. See *id.*

112. See CISG, *supra* note 1, art. 60(a).

113. See *id.* art. 60(b).

114. It seems more likely that nonpayment by a buyer would amount to a fundamental breach than would, for example, cause a delay in delivery by the seller. See SCHLECHTRIEM, *supra* note 107, at 486.

the period must stipulate performance by a particular date.<sup>115</sup> A mere demand for performance, by itself, is not sufficient.<sup>116</sup> However, when the party fixes additional time, a demand for performance must be made.<sup>117</sup> For example, in the case of delay in delivery by the seller, the buyer may state to the seller, "you have until May 1 to deliver the goods."<sup>118</sup> Precatory language, such as "I hope delivery will be made by May 1," is not a sufficient demand. On the other hand, it is not necessary that the party demanding performance threaten to refuse to accept performance after the time fixed for performance.<sup>119</sup>

The time for performance must be a reasonable period of time. What is reasonable depends largely on the circumstances. Professor Peter Schlechtriem comments that the following matters should be taken into account to determine whether the length of time is reasonable:<sup>120</sup>

[1] [L]ength of time of the contractual delivery period (transactions with short delivery dates justify a shorter additional period, long delivery dates require a longer additional period); [2] the buyer's recognizable interest in rapid delivery, if the seller should have been aware of that interest upon conclusion of the contract; [3] the nature of the seller's obligation (a longer period is reasonable for delivery of complicated apparatus and machinery of the seller's own manufacture than for delivery of fungible goods by a wholesaler); [4] the nature of the impediment to delivery (if the seller is affected by a fire or strike, the buyer can be expected to wait for a certain time if the delivery is not particularly urgent).<sup>121</sup>

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115. *See id.* at 395.

116. *See id.*

117. *See id.* at 396.

118. *See id.*

119. *See id.*

120. The comments by Professor Schlechtriem were focused on buyers' rights in Article 47, although similar considerations would be applicable for sellers under Article 63.

121. SCHLECHTRIEM, *supra* note 107, at 396 (citations omitted). Professor Schlechtriem continues,

In critical cases, the most important factor will be whether the buyer's interest in rapid delivery was apparent upon the conclusion of the contract. If the buyer requires particularly rapid delivery and the seller could not have been aware of that fact when concluding the contract, it cannot be taken into account. . . . If an additional period of time is fixed for delivery, regard must be had to the fact that the period is 'additional' to the originally agreed delivery period. The seller is not entitled to be treated as if the contract has just been concluded. It is therefore not intended that, where delivery requires a lengthy preparatory period, the seller should be given an

Professor Schlechtriem comments that in a situation in which a party has fixed a period of time that is too short a distinction must be made with respect to its effects.<sup>122</sup> If the party who fixed the time seeks to declare the contract avoided after the unreasonably short length, she may only do so if a fundamental breach has occurred. In this situation, the party's "over-hasty declaration of avoidance" constitutes a breach of contract.<sup>123</sup> On the other hand, if the party fixing additional time does not declare the contract avoided immediately, but rather waits until after a reasonable period has passed, then Professor Schlechtriem notes the party should have the right to declare the contract avoided.<sup>124</sup> Where a period of time has been fixed that is longer than a reasonable time, the party fixing the additional time nevertheless is bound by the time fixed.<sup>125</sup>

*c. The effect of Nachfrist after the additional period has passed.*

When a party fixes an additional period of time, the party may not resort to any other remedy until the period has passed, even if nonperformance by the other party otherwise constitutes fundamental breach.<sup>126</sup> The party who fixed the time is precluded not only from avoiding the contract but also from resorting to such remedies as demanding a price reduction,<sup>127</sup> recovering costs for curing defects,<sup>128</sup> demanding delivery of substitute goods,<sup>129</sup> or demanding that the other party perform under the contract.<sup>130</sup>

When a party has used the *Nachfrist* procedure, she may resort to a remedy in two situations. First, the day the *Nachfrist* period expires, the other party must have performed or the aggrieved party may resort to a remedy. Second, if the party who must perform refuses to perform and notifies the aggrieved party, then the aggrieved

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additional period for delivery of the same length as the original period, when he has not even begun those preparations at the beginning of that additional period.

*Id.* at 396–97.

122. *See id.* at 397.

123. *Id.*

124. *See id.*

125. *See id.*

126. *See* CISG, *supra* note 1, arts. 47(2), 63(2); SCHLECHTRIEM, *supra* note 107, at 399.

127. *See* CISG, *supra* note 1, art. 50.

128. *See id.* art. 45(1)(b).

129. *See id.* art. 46(2).

130. *See* SCHLECHTRIEM, *supra* note 107, at 399.



party need not wait until the *Nachfrist* period has expired.<sup>131</sup> In either situation, the aggrieved party gains a right to avoid the contract, a right to claim damages,<sup>132</sup> and other rights provided in the Convention.

### 3. *Flexibility of the Nachfrist procedure in the CISG*

The Clod Jumper example given above illustrates that the *Nachfrist* option is a right of an aggrieved party, rather than an option to create a supplemental agreement. The provisions in Articles 47 and 63 permit flexibility for parties to a contract and facilitate reasonable performance. The *Nachfrist* provisions in both the CISG and the UNIDROIT Principles differ somewhat from the provisions in the German Civil Code ("*Bürgerliches Gesetzbuch*" or "BGB"),<sup>133</sup> upon which the provisions in the Convention and the Principles is partially based.<sup>134</sup> Under German law,<sup>135</sup>

131. *See id.*

132. Under Article 47(2) and 63(2), the aggrieved party is not deprived of the right to claim damages caused by the delay in performance, even if additional time is extended through the *Nachfrist* procedure.

133. *Bürgerliches Gesetzbuch* (Civil Code) [BGB] § 326(1) (Otto Palandt ed. 44th ed. 1985); *see also* van Vuuren, *supra* note 9, at 613 nn. 169–75. The United Nations Secretariat commentary to Article 47 and 63 indicate that both have a "certain parentage in the German procedure of *Nachfrist* and the French procedure of *mise en demeure*," although neither Article 47 nor 63 partakes of either the German or French counterpart. Secretariat of the United Nations, *Secretariat Commentary on Article 43 of the 1978 Draft* [draft counterpart of CISG Article 47] (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-47.html>> [hereinafter Secretariat's Commentary to Article 47]; Secretariat of the United Nations, *Secretariat Commentary on Article 59 of the 1978 Draft* [draft counterpart of CISG Article 63] (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-63.html>> [hereinafter Secretariat's Commentary to Article 63].

134. *See* RICHARD SCHAFFER ET AL., *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 111 (2d ed. 1993) ("[C]ivil-law systems traditionally grant an additional period of time, *beyond the date called for in the contract*, within which the parties may perform."); DiMatteo, *supra* note 3, at 77 n.46; van Vuuren, *supra* note 9, at 613, 630.

135. The differences between the German philosophy of commercial law and that found in either the Anglo-American system or the CISG are somewhat beyond the scope of this discussion. Maryellen DiPalma comments,

German contract law is grounded in an environment of flexibility and legal informality which differs greatly from Anglo-American jurisprudence. Contracting parties are given free reign under the [BGB] . . . in structuring their contractual relationships. This permits parties greater latitude in structuring transactions using more numerous legal instruments to effectuate their intent. The German approach to contractual liability is also more consequence-based than that of the common law system. German law places less emphasis on types of legal instruments used and the labels applied to them as well as on the legal meaning of the words used within the

Where delay *per se* would not frustrate the purpose of the contract, i.e. where time is not of the essence, the obligee *must* fix a reasonable period of grace (*Nachfrist*) for the obligor before resorting to either remedy. The period of grace must be long enough to allow an obligor, who has already taken the necessary preparatory steps, to perform the contract within this time. The obligee must make it clear in his notice that after the period of grace he will refuse to accept any performance. If the obligee has given notice and the obligor has not performed within the period of grace, the obligee may no longer claim performance. The contract can now only be wound up, either by a claim for damages for non-performance, or by a claim for rescission. A claim for specific performance is expressly prohibited by § 326(1) [of the BGB] and the options available to the aggrieved party are thereby limited. The obligee is not required at this stage to indicate whether he will rescind and claim restitution or claim damages, but he has to stay with the choice once it is unequivocally made. The choice is exercised . . . without undue delay, otherwise the aggrieved party may lose his right to rescind. It is generally more favourable to claim damages.<sup>136</sup>

Like German law, the party giving the *Nachfrist* notice under the CISG (as well as the UNIDROIT Principles) may not resort to any other remedy during the stated period, with the exception of the right to claim damages for the delay.<sup>137</sup> After the stated period, the

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instruments. German commercial law attempts, instead, to give greater effect to the implicit purpose of the instruments.

Maryellen DiPalma, *Nachfrist Under National Law, the CISG, and the UNIDROIT and European Principles: A Comparison*, 5 INT'L CONTRACT ADVISOR 28 (Winter 1999) (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/biblio/DiPalma.html>>; see also Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 123–24 (1997).

136. van Vuuren, *supra* note 9, at 613–14 (footnotes omitted) (emphasis added); see also GERHARD DANNEMANN, AN INTRODUCTION TO GERMAN CIVIL AND COMMERCIAL LAW 29 (1993); NIGEL G. FOSTER, GERMAN LAW & LEGAL SYSTEM 217 (1993); NORBERT HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW 104 (Tony Wier trans., 1982); Ludwig Linder, *Law of Contracts*, in BUSINESS TRANSACTIONS IN GERMANY 10-1, § 10.04(4) (Dennis Campbell et al. eds., 2000). DiPalma offers the following loose translation of section 326 of the BGB:

The Creditor must, as a general rule, reasonably extend the original term for performance unless such contractual performance is of no further interest to the Creditor due to the delay or unless the final deadline is apparently, for some other reason, superfluous. When the grace period has elapsed without completion of the contractual obligation, the Creditor must choose between damages for non-performance and avoidance of the contract. A claim for performance is, however, excluded.

DiPalma, *supra* note 136 (see section titled “*Nachfrist* under German Law”).

137. See CISG, *supra* note 1, arts. 47(2), 63(2); Principles, *supra* note 88, art. 7.1.5(2).

aggrieved party may avoid the contract<sup>138</sup> or may bring a claim for specific performance.<sup>139</sup> The latter option is contrary to German law, which expressly prohibits an action for specific performance after the *Nachfrist* period has expired.<sup>140</sup> Both the CISG and the Principles also grant the aggrieved party the right (or option)<sup>141</sup> to use the *Nachfrist* procedure even if nonperformance rises to a level of a fundamental breach.<sup>142</sup> Where CISG applies (or where the UNIDROIT Principles are considered), aggrieved parties have available to them more options and may proceed—in many cases extrajudicially—with greater certainty than would be available without the *Nachfrist* procedure or even with the procedure found in German law.<sup>143</sup>

The drafters of both the UNIDROIT Principles and the CISG recognized that late performance differs significantly from other forms of defective performance.<sup>144</sup> According to the official comments to the UNIDROIT Principles,

Late performance can never be remedied since once the date for performance has passed it will not occur again, but nevertheless in

138. See CISG, *supra* note 1, arts. 49, 64.

139. DiPalma comments,

In German case law, a notice period of additional time that is too short will be enlarged de jure to a reasonable period of time unless the buyer, by the shortness of the stipulated period, demonstrates an intention to effectively provide no additional period. That extension of time is automatic, unlike similar notices under common law where a fresh notice may have to be served since a judicially-invalidated notice will be treated as having no effect. Under German law, if the buyer requests a *Nachfrist*, the seller is obligated to respond to the request. Failure to do so results in an automatic grant of additional time.

DiPalma, *supra* note 135 (see section titled “*Nachfrist* Under German Law”).

140. See BGB, *supra* note 133, § 326(1); see also Schadbach, *supra* note 19, at 350; van Vuuren, *supra* note 9, at 630. Schadbach comments, “[Under the German law, after] the grace period has elapsed without the performance, the claimant can choose between the remedies of damages for non-performance and avoidance of the contract. A claim for performance, however, is excluded.” Schadbach, *supra* note 19, at 350.

141. The language used in Articles 47(1) and 49(1) (in the case of a buyer) and Articles 63(1) and 64(1) clearly suggests *Nachfrist* is an option in addressing the aggrieved parties rights in the event of nonperformance.

142. See CISG, *supra* note 1, arts. 47, 63; Principles, *supra* note 88, art. 7.1.5 and comment; van Vuuren, *supra* note 9, at 630.

143. See van Vuuren, *supra* note 9, at 630.

144. See International Institute for the Unification of Private Law, *Official Comments on Article of the UNIDROIT Principles* (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/principles/uni47.html>> [hereinafter Official UNIDROIT Comments]; Secretariat’s Commentary to Article 47, *supra* note 133, cmt. 2; Secretariat’s Commentary to Article 63, *supra* note 133, cmt. 2.

many cases the party who is entitled to performance will much prefer even a late performance to non performance at all. Secondly, at the moment when a party fails to perform on time it is often unclear how late performance will in fact be. The commercial interest of the party receiving performance may often therefore be that a reasonably speedy completion, although late, will be perfectly acceptable but that a long delayed completion will not. The [*Nachfrist*] procedure enables that party to give the performing party a second chance without prejudicing its other remedies.<sup>145</sup>

Rather than requiring one party to seek from the other adequate assurances of performance, granting additional time may solve many instances of delay. For example,<sup>146</sup> assume A agrees to sell a special automobile to B. The contract provides that the automobile will be ready by July 1. On June 30, B needs the automobile, but A has not quite finished. A assures B that the car will be completed in one week. Though it is apparent that A will not perform a substantial part of his obligations,<sup>147</sup> B may not desire to suspend his own obligations and demand adequate assurance from A (assuming the delay does not amount to a fundamental breach under the CISG, which would permit avoidance).<sup>148</sup> Rather, B may grant the additional week

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145. Official UNIDROIT Comments, *supra* note 144, art. 7.1.5 cmt. 1. The United Nations Secretariat's commentary to Articles 47 and 63 also indicate that cases of delay should be treated differently than those of defective performance. With respect to Article 47's *Nachfrist* procedure for aggrieved buyers, the commentary suggests,

If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying avoidance of the contract under Article [49(1)(a)]. . . . This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not yet delivered the goods. In these circumstances the buyer may do so if, and only if, the failure of delivery on the contract delivery date causes him substantial detriment and the seller foresaw or had reason to foresee such a result.

Secretariat's Commentary to Article 47, *supra* note 133, cmts. 2 and 4. The commentary to the seller's right to avoid for mere nonpayment on the date of the buyer's performance is almost identical. See Secretariat's Commentary to Article 63, *supra* note 134, cmts. 2 and 4.

146. This example is based on one provided in the official comments to the UNIDROIT Principles. See Official UNIDROIT Comments, *supra* note 144, art. 7.1.5 ill. 1.

147. Under the terminology of section 2-609, A would have "reasonable grounds for insecurity." UCC § 2-609(2).

148. See CISG, *supra* note 1, arts. 25, 71(1), (3).

and continue performance.<sup>149</sup> The option open to B—to choose not to suspend his own performance by granting a reasonable extension—is the essential difference between a party's rights under the Convention and the Code in a situation involving a delay in performance.<sup>150</sup> This option, this Article suggests in the following two sections, should be included in the revised UCC.

#### IV. CONSIDERATION OF INCLUDING *NACHFRIST* IN THE UCC

The concept of the *Nachfrist* procedure is not complicated, but it is powerful for buyers and sellers in contracts governed by the CISG. At present, however, it likely has limited practical application for most U.S. companies, since most opt out of the CISG when drafting their international contracts. This occurs even though Article 6 permits parties to accept some provisions in the Convention and derogate from or vary the effect of other provisions.<sup>151</sup> More-

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149. The issue of what constitutes sufficient notice may be explained with an example provided by Professor Honnold:

A contract called for Seller to manufacture and deliver a complex stamping machine to Buyer by June 1. Seller was late in making delivery and on June 2 Buyer wired Seller: "We are anxious to receive machine. Hope very much that it can arrive by July 1." Seller delivered the machine on July 3, but Buyer refused the machine and declared that the contract was avoided for failure to comply with the July 1 delivery date set forth in its wire of June 2. . . .

. . . Such a notice gives no warning that a deadline has been "fixed." Indeed, a communication that invites performance without making clear that a final deadline has been set could mislead the seller into an attempt at substantial performance. An effective notice under Article 47(1) should make clear that the additional period sets a fixed and final limit on the date for delivery . . . .

JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 369-70 (2d. ed. 1991); see also Secretariat's Commentary to Article 47, *supra* note 134, cmt. 7 ("the period may be fixed either by specifying the date by which performance must be made . . . or by specifying a time period. . . . A general demand by the buyer that the seller perform or that he perform 'promptly' or the like is not a 'fixing' of a period of time under [Article 47]"); Secretariat's Commentary to Article 63, *supra* note 134, cmt. 7 (same); DiPalma, *supra* note 135 (see heading titled "*Nachfrist* Under CISG"). The Official Comments to the UNIDROIT Principles offers a similar illustration to that of Professor Honnold's. See Official Comments to UNIDROIT Principles, *supra* note 144, art. 7.1.5 ill. 2 (*Nachfrist* notice of one month insufficient where performance will clearly take three months).

150. This does not ignore the provision in § 2-610, permitting an aggrieved party to await performance from a repudiating party for a commercially reasonable time. UCC § 2-610(1). Where a *Nachfrist* provision differs from this option, the aggrieved party may fix the additional time, knowing that performance will be due at the conclusion of this period, rather than wait for performance when the other party repudiates the contract.

151. See CISG, *supra* note 1, art. 6.

over, the CISG's *Nachfrist* procedure does not seem to suit the current version of the UCC. The two primary factors in requiring extended time—the presumption of specific performance and the need for a fundamental breach—are absent from the UCC. Nonetheless, the CISG and the UNIDROIT Principles have demonstrated that the application of the *Nachfrist* procedure can effectively facilitate the performance of a contract where one party has delayed performance. Potential inclusion of the *Nachfrist* doctrine has been discussed by several commentators<sup>152</sup> and is discussed here.

The process of incorporating *Nachfrist* requires a rethinking of some of the mechanics in the current version of the UCC. This process also requires a reasoned justification for inclusion. Perhaps the most reasonable justification would be the potential of the *Nachfrist* procedure as a method of self-help in Article 2.<sup>153</sup> If inclusion is justified on this ground, then the provisions requiring revision in the current version of the Code may be considered. This section first discusses the utility of implementing a self-help provision such as *Nachfrist* into Article 2, explores the problems of incorporation in the current version, and shows how the *Nachfrist* procedure could aid the treatment of a delay in performance.

#### A. Utility of Self-Help

Self-help provisions are often thought to be solutions to the overly litigious nature of Americans.<sup>154</sup> Among the policies of the UCC are the goals “to simplify, clarify and modernize the law governing commercial transactions,”<sup>155</sup> and “to permit the continued

152. See *supra* note 24.

153. The views considered primarily are those of E. Allen Farnsworth, E. ALLEN FARNSWORTH, 2 FARNSWORTH ON CONTRACTS § 8.19a (2d ed. 1998), and Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839 (1998).

154. See Taylor, *supra* note 153, at 841. Professor Taylor explains,

What this view [that Americans are too litigious] ignores, however, is that many disputes never reach the courthouse. In a wide spectrum of controversies, a typical reaction to trouble is to attempt to remedy the situation privately through the exercise of “self-help.” The term “self-help” refers to private actions taken by those interested in the controversy to prevent or resolve disputes without official assistance of a governmental official or disinterested third party. The misperception of the unduly litigious nature of Americans could be minimized if more explicit recognition were given to self-help, a practice already prevalent in our law.

*Id.* (footnotes omitted).

155. UCC § 1-102(2)(a).

expansion of commercial practices through custom, usage and agreement of the parties.”<sup>156</sup> Examples outside of Article 2 include the secured party’s right under Article 9 to take possession of collateral after the debtor defaults<sup>157</sup> and the drawer’s right to stop payment on a check.<sup>158</sup> Professor Farnsworth comments, however, that self-help can have a broader meaning:

The term [self-help] is, however, sometimes used in a wider sense [than the procedures in Articles 4 and 9] to comprise a variety of steps not involving judicial intervention that a party can take to protect its interests after the contract has been made. A realization of the potential benefits in reducing the burdens on courts as well as in mitigating the hardships on the aggrieved party has probably contributed to their increased availability in recent decades, particularly since the advent of the Uniform Commercial Code.<sup>159</sup>

A major consideration in determining whether a self-help remedy should be included is the benefits on the parties who will use the remedy.<sup>160</sup> Professor Celia Taylor observes,

Parties frequently choose self-help remedies. This suggests that there are real or perceived benefits in self-help that motivate parties to elect it. One major factor enhancing the likelihood that a party will engage in self-help is the immediacy of the action. Parties can act quickly in response to problems if they can avoid seeking judicial remedy or other third-party intervention, both of which typically involve delay. . . . This avoids delays in dealing with the goods, which could frustrate a seller’s interests and cause real psychological harm. Moreover, self-help action is more certain in its immediate result. A party waiting for judicial determination of rights and obligations may not be able to take protective action prior to decision since the outcome of the judicial process is uncertain. Although a party may have to pay for its decision to exercise

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156. UCC § 1-102(2)(b).

157. See UCC § 9-503; FARNSWORTH, *supra* note 153, § 8.19a.

158. See UCC § 4-403; FARNSWORTH, *supra* note 153, § 8.19a.

159. FARNSWORTH, *supra* note 153, § 8.19a (footnotes omitted).

160. See Taylor, *supra* note 153, at 847. Professor Taylor provides a rather comprehensive analysis of self-help in general, concluding that *Nachfrist* should be a self-help provision included in the revised UCC. See *id.* at 901. This Article does not purport to offer such an exhaustive analysis of self-help in general but introduces the concept as a justification for inclusion.

self-help, its use produces an immediate result that is certain. Such certainty does not exist in the judicial domain.<sup>161</sup>

Additionally, self-help allows parties to protect their interests without judicial intervention<sup>162</sup> and also provides greater options even where a self-help provision is used to terminate a contract.<sup>163</sup>

Examples of the utilization of self-help already exist in Article 2 but do not tend to provide an aggrieved party the benefits that self-help procedures should provide. Professor Farnsworth divides self-help into two categories: dispute-related and performance-related.<sup>164</sup> A buyer's option to cover or a seller's option to resell goods are examples of the dispute-related category.<sup>165</sup> Examples of the performance-based category are suspending performance and demanding adequate assurance.<sup>166</sup> The *Nachfrist* procedure, if included in the revised Article 2, would certainly fall within the performance-based category. Professor Farnsworth comments that *Nachfrist* is an exception to the premise of constructive conditions of exchange in other performance-based procedures, namely suspending performance and demanding adequate assurance.<sup>167</sup> The constructive conditions placed on a party facing a potential breach require that the party take the risk of becoming the party in breach if suspending performance is deemed wrongful.<sup>168</sup> Creating uncertainty and placing an aggrieved party at risk can undermine the purpose of a self-help remedy and justify rethinking the available procedures to the aggrieved parties. The next section considers some problems raised by existing provi-

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161. *Id.* at 847 (footnotes omitted). Professor Taylor recognizes a number of additional benefits, such as reducing later evidentiary problems, allowing a cheaper alternative than resorting to official action, and other subtle factors that "include psychological components of control and autonomy." *Id.*

162. *See id.* at 849.

163. *See id.*

164. *See* FARNSWORTH, *supra* note 153, § 8.19a.

165. *See id.*

166. *See id.*

167. *See id.* The constructive conditions of exchange were "given shape by Mansfield and [were given] style by Corbin." Professor Farnsworth comments,

The rationale for giving an aggrieved party the rights to suspend its own performance and to demand assurance of the other party's performance is that the aggrieved party's duties are constructively conditional on the other party's doing what it is to do in the order determined by the contract. The availability of performance-related self-help is therefore closely tied to the order of the parties' performances.

*Id.* (footnotes omitted).

168. *See* Taylor, *supra* note 153, at 903.



sions in Article 2 and considers how the *Nachfrist* procedure could provide a solution to these problems.

*B. The Incorporation Process: Rethinking Current Article 2 Provisions*

*1. The standards for breach in Article 2*

*a. The perfect tender rule.* The procedure for suspending performance and seeking adequate assurance of performance is just one area that may be reconsidered in determining how effective inclusion of the *Nachfrist* procedure would be in Article 2. As previously noted, the threshold for breach in a one-shot contract is the oft-maligned perfect tender rule in section 2-601.<sup>169</sup> In a sense, perfect tender may be considered a self-help remedy in itself, permitting a party to reject nonconforming goods without judicial intervention.<sup>170</sup> The Code binds the buyer to exercise good faith and commercial reasonableness<sup>171</sup> but otherwise permits a party to take action for himself in the event of nonconformity in the goods or tender of delivery.<sup>172</sup>

Under the perfect tender rule, if the parties stipulate a definite manner, time, and place for delivery in the contract—or particularly if the parties stipulate time is of the essence—nonconformity in the tender of the delivery will allow one party to reject a shipment and possibly terminate the contract.<sup>173</sup> In this situation, the *Nachfrist* procedure would not provide substantial aid to a party facing a potential breach. For example, if the parties stipulate delivery is due on July 1 and delivery is made on July 8, then section 2-601 permits the party receiving the goods to reject for failure of conformity of tender of delivery.<sup>174</sup> The party facing potential breach need not be concerned about whether a slight delay rises to the level of a fundamen-

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169. See *supra* Part III.A.2; UCC § 2-601.

170. According to the official comment, one of the purposes of adding the provisions in § 2-601 was “[t]o make it clear that . . . [a] buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him.” UCC § 2-601 cmt. 1.

171. See *id.*

172. The Code’s comment indicates more concern with the effect of the buyer’s partial or full acceptance of goods than with the full rejection of the goods. See *id.* cmt. 2.

173. See UCC §§ 2-503(1); 2-601; 2-106(3).

174. See UCC § 2-601. To be sure, the party facing breach may invoke one of the existing self-help options before July 1, such as demanding adequate assurance. Moreover, under section 2-610, the party may await performance for a commercially reasonable time.

tal or material breach, since the perfect tender rule requires conformity to the contract terms. This rather simplistic example admittedly ignores the commercial reality that a party who enters into an agreement likely does not seek termination for mere delay in delivery but does illustrate that the concern for determining whether the delay is fundamental is absent under the perfect tender rule.<sup>175</sup>

Applying *Nachfrist* may cast doubt on the need for the perfect tender rule but only if the drafters of the revised UCC include *Nachfrist* wholesale. Even if one hypothesizes that the standard of breach should be more stringent than perfect tender (not ignoring section 2-601's application), it is not likely feasible to establish a new standard for breach not otherwise existing in contract law. The CISG's threshold for fundamental breach is not founded on any existing national law,<sup>176</sup> and it is doubtful whether it would even be introduced in the law governing the sale of goods when the common law threshold is material breach.<sup>177</sup> Although the perfect tender rule altered the standard for breach in traditional contract law (i.e., the material breach standard), a workable set of standards remains to determine breach: perfect tender in one-shot commercial transactions but material breach in situations outside the Code.<sup>178</sup> This would not likely be true if the standard for breach in the Code were a "fundamental" breach while the traditional standard is "material" breach.

b. "*Substantial impairment*" in installment contracts. Revisions to Article 2 provisions beyond the standard of breach will likely be more tenable, but *Nachfrist* may provide some level of certainty to another standard for breach in the Code—that of installment con-

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175. It is rather difficult to consider whether *Nachfrist* would be applicable in the two instances where a seller may cure nonconformity. See *supra*, notes 77-80 and accompanying text. Where the seller may cure before the time for delivery has expired, there exists little need for the buyer to affix additional time for delivery. See UCC § 2-508(1). Where the time for delivery has passed, the seller may—interestingly enough—be granted further additional time to cure if she had reasonable grounds to believe the nonconforming goods would be acceptable. See UCC § 2-508(2). In either of these situations, it is clear that the buyer need not be concerned about whether his action to terminate (or bring action for damages) would itself be a breach.

176. See Taylor, *supra* note 153, at 904 and n.356.

177. However, as noted *infra*, Part IV.2.b, similarities exist between the fundamental breach threshold in the CISG and the threshold for breach of an installment contract under § 2-612 of the Code.

178. This is particularly true when one considers that the doctrine of substantial performance would be of little use in facilitating the sale of goods, as compared to a service-related contract.

tracts.<sup>179</sup> Under section 2-612(2), a buyer may reject any nonconforming installment “if the non-conformity substantially impairs the value of the installment and cannot be cured.”<sup>180</sup> Under section 2-612(3), a breach of the entire installment contract occurs when “one or more installments substantially impairs the value of the whole contract.”<sup>181</sup> The question of what constitutes “substantial impairment” has usually been directed at subsection (3) of section 2-612,<sup>182</sup> but *Nachfrist* could provide a procedure that would clarify the provisions found in subsection (2) as well, especially the provision granting the seller an opportunity to cure.

Comment 4 to section 2-612 states,

[An] installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. . . . Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purpose of the contract.<sup>183</sup>

Under subsection (2), a buyer must accept an installment if the seller gives adequate assurances of cure.<sup>184</sup> Comment 5 indicates that adequate assurance in this section is measured by the same standards as

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179. UCC § 2-612(1) defines “installment contract” as “one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause ‘each delivery is a separate contract’ or its equivalent.” See also UCC § 2A-510 (determining breach of an installment lease).

180. UCC § 2-612(2).

181. UCC § 2-612(3). This section further states that “the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.”

182. See WHITE & SUMMERS, *supra* note 75, § 3-3(b) (“To date, there is little case law under 2-612(2). The judicial activity has been under 2-612(3) where the standard does not ‘substantially impair the value of that installment’ but ‘substantially impairs the value of the whole contract.’”).

183. UCC § 2-612 cmt. 4.

184. See UCC § 2-612(2). The text of subsection (2) and comment 4 seem to indicate that the cure is more focused on nonconformity in the quality of the goods, rather than on the timeliness of delivery. However, comment 4, quoted in the text above, also indicates that substantial impairment can turn on the time factor. See UCC § 2-612 cmt. 4.

under the right of adequate assurances of performance in section 2-609.<sup>185</sup>

Utilizing the *Nachfrist* procedure in lieu of (or as a supplement to) the adequate assurance provision in section 2-609 is discussed below,<sup>186</sup> but the procedure could apply equally in section 2-612(2) as well, especially in the case of a delay in delivery. For example, if the seller is required to make a delivery in an installment contract on July 1, but the delivery is delayed, the buyer may reject the shipment only if the nonconformity in the tender substantially impairs the value of the installment. Under the current section 2-612, even if the nonconformity does result in a substantial impairment, the seller may give adequate assurance of cure and prevent the buyer from rejecting the installment. While this procedure facilitates the continuance of the contract, continuing delays in installment deliveries (which presumably do not substantially impair the value of the whole contract) may lead the buyer to want to reject a late installment, even if the seller can give assurances to cure.

If the *Nachfrist* procedure were available, the buyer could set a date—July 15, for example—upon which the delivery must be made. The buyer would be unable to reject the installment until that date. But after July 15, the buyer could reject the installment without undue concern about whether the delay substantially impaired the installment or without waiting to give the seller an opportunity to cure.

The provisions in subsection (3) of section 2-612 perhaps more clearly illustrate the effective use of *Nachfrist*, not only for a buyer in the case of delay of delivery but also for a seller in the case of non-payment by the buyer.<sup>187</sup> The “substantial impairment” doctrine is

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185. See UCC § 2-612 cmt. 5. Comment 5 states,

Under subsection (2) an installment delivery must be accepted if the nonconformity is curable and the seller gives adequate assurance of cure. Cure of nonconformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection.

186. See *infra* Parts IV and V. A clear relationship exists between adequate assurance of performance and the provisions in 2-612(2) and (3).

187. The language of subsection (2) specifically indicates it is applicable as a buyer's remedy. See UCC § 2-612(2) (delineating between the buyer's and seller's duties). Subsection (3), on the other hand, does not delineate between buyer and seller but refers to the options of the “aggrieved party.” See UCC § 2-612(3).

closely related to the concept of "material breach."<sup>188</sup> Professors White and Summers observed,

The basic test in the installment case under [section] 2-612(3) is that the goods be "substantially" nonconforming. The Code gives no guidelines to determine which performances are substantially nonconforming and which are only insubstantially so. The common law concept of "material breach" is at least a first cousin to the concept of "substantial nonconformity," and it offers a fruitful analogy to one who seeks to determine whether the seller's performance substantially nonconforms.<sup>189</sup>

Though fundamental breach under the CISG clearly was not derived from the UCC's concept of substantial impairment, one cannot avoid the similitude.<sup>190</sup> Similar to the rationale behind requiring fundamental breach in the Convention,<sup>191</sup> "[s]ubsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation."<sup>192</sup>

What amounts to substantial impairment of the value of the whole contract is typically a troublesome question to answer.<sup>193</sup> In

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188. See *supra* notes 60–69 and accompanying text.

189. WHITE & SUMMERS, *supra* note 75, § 8-3(b).

190. See *supra* Part III.3.b.

191. See *supra* notes 86–90 and accompanying text.

192. UCC § 2-612 cmt. 6.

193. Professors White and Summers, as well as Professors Calamari and Perillo, illustrate the difficulty of this question with the case of *Continental Forest Products, Inc. v. White Lumber Sales, Inc.*, 474 P.2d 1 (Or. 1970). White and Summers summarize this case as follows:

[T]here was an installment contract for the sale of twenty carloads of plywood. The first carload did not conform to the contract because nine percent of the plywood in the car deviated from the thickness specifications. The trade standard authorized deviations of five percent. The second and third carloads which arrived at buyer's place of business after buyer had purportedly canceled the contract did conform. The court held that the deviation did not substantially impair the value of the whole contract and found moreover that the non-conformity could be cured by an adjustment in the price.

WHITE & SUMMERS, *supra* note 75, § 8-3(b); see also CALAMARI & PERILLO, *supra* note 60, at 11-20(d). Professors White and Summers further illustrate the determination of substantial impairment with a pre-code case, *Plotnick v. Pennsylvania Smelting & Refining Co.*, 194 F.2d 859 (3d Cir. 1952). The judge in that case observed,

First, non-payment for a delivered shipment may make it impossible or unreasonably burdensome from a financial point of view for the seller to supply future installments as promised. Second, buyer's breach of his promise to pay for one installment may create such reasonable apprehension in the seller's mind concerning payment for future installments that the seller should not be required to take the risk involved in continuing deliveries.

the case of a delay in delivery, establishing substantial impairment of the whole contract based on this delay is difficult, even more so than establishing breach in one installment.<sup>194</sup> A *Nachfrist* procedure could permit the buyer to fix additional time, after which the delay would be deemed to be substantial impairment of not only the installment but also of the whole contract. The case of nonpayment by a buyer presents similar problems in determining whether such nonpayment causes substantial impairment of the whole contract. A *Nachfrist* notice could require payment due on a particular date, with nonpayment by that date being considered substantial impairment of the whole contract.<sup>195</sup>

Though the *Nachfrist* procedure adopted by the CISG seems to adapt rather smoothly to the standard of breach in installment contracts, a few other problem areas exist. One concern is that if the standard of breach for one-shot contracts remains the perfect tender rule adoption of *Nachfrist* would likely be available only to parties in an installment contract.<sup>196</sup> This fact could easily defeat the purpose of including the *Nachfrist* provision, since the party would first have to ascertain whether the standard for breach were perfect tender or substantial impairment before utilizing *Nachfrist* as a self-help provision.<sup>197</sup>

Another concern (and the topic of the next section) is whether *Nachfrist* can serve to supplement the already-existing self-help remedy of adequate assurance of performance, or whether *Nachfrist* must necessarily replace the Code's current provisions.<sup>198</sup>

*Id.* at 862.

194. See THOMAS M. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 186 (1978).

195. Other problems incorporating *Nachfrist* would include the second sentence of subsection (3), which provides, "[T]he aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance of future installments." UCC § 2-612(3).

196. By comparison, the right of adequate assurance of performance in § 2-609 is more readily applicable to both one-shot contracts and to installment contracts.

197. Of course, this assumes it to be infeasible to utilize *Nachfrist* with the perfect tender rule. See *supra* Part IV.B.1.a.

198. Professor Taylor, for one, suggests that the *Nachfrist* procedure is superior as a self-help remedy and should be adopted to broaden the availability of self-help procedures. Taylor, *supra* note 153, at 904; see also Schadbach, *supra* note 19, at 350 (suggesting *Nachfrist* would change the current UCC provisions for notice of termination and requests for adequate assurances). Neither the notice of termination under § 2-309(3) nor the notice of cancellation in §

## 2. *Right to adequate assurance of performance*

The benefits of including *Nachfrist* as a self-help procedure may suggest that it replace the right to adequate assurance of performance (under section 2-609) because *Nachfrist* accomplishes the Code's objective of mitigating the effect of repudiation.<sup>199</sup> Section 2-609 contains some problematic language and "sometimes does little more than extend the minuet between the weaseling party and the contractual counterpart and add a couple of new moves."<sup>200</sup> Nevertheless, the *Nachfrist* procedure typically applies in a situation of delay in performance and is probably not appropriate in all cases where a party has "reasonable grounds for insecurity."<sup>201</sup> The fact that the CISG contains both a *Nachfrist* procedure and a procedure for suspending performance pending adequate assurance indicates that both procedures may coexist without undue interference in application with the other.<sup>202</sup> As this section explains, adoption of the *Nachfrist* procedure should not mean exclusion of the procedure for adequate assurances under section 2-609.

*a. Problematic language in § 2-609.* Section 2-609 introduced the concept of adequate assurances of performance into sales law to aid an aggrieved party where the other party displays serious prospective inability to perform or unwillingness to perform.<sup>203</sup> Under subsection (1) of 2-609,

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.<sup>204</sup>

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2-612(3) would seem to prove problematic if *Nachfrist* were applied. Article 26 of the CISG requires notice to the defaulting party.

199. See WHITE & SUMMERS, *supra* note 75, § 6-2.

200. *Id.*

201. UCC § 2-609.

202. See CISG, *supra* note 1, art. 71(3).

203. See CALAMARI & PERILLO, *supra* note 60, § 12-2.

204. UCC § 2-609(1).

The provision for adequate assurances has no common law counterpart, although the Restatement Second contains a version of adequate assurances.<sup>205</sup> The first comment to section 2-609 explains,

The section rests on the recognition of the fact that the essential purpose of a contract between men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. . . . Once [a party] has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.<sup>206</sup>

The Code defines neither "adequate assurances" nor "reasonable grounds for insecurity," with the comment indicating that commercial reasonableness is a major factor.<sup>207</sup> Three measures have been adopted by this section "to meet the needs of commercial men" in the situations covered by section 2-609.<sup>208</sup> First, the aggrieved party may suspend performance, meaning she may "hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action."<sup>209</sup> Second, the aggrieved party may seek adequate assurances that the other party's performance will be duly forthcoming.<sup>210</sup> Finally, section 2-609 "provides the means by which the aggrieved party may treat the contract as broken if his

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205. See CALAMARI & PERILLO, *supra* note 60, § 12-3; RESTATEMENT (SECOND) OF CONTRACTS § 251.

206. UCC § 2-609 cmt. 1.

207. See UCC § 2-609 cmt. 2; CALAMARI & PERILLO, *supra* note 60, § 12-2; WHITE & SUMMERS, *supra* note 75, § 6-2. Subsection (2) of 2-609 provides the standard between merchants: "The reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards." UCC § 2-609.

208. UCC § 2-609 cmt. 2.

209. *Id.*; see also CALAMARI & PERILLO, *supra* note 60, § 12-2.

210. See UCC § 2-609 cmt. 2; CALAMARI & PERILLO, *supra* note 60, § 12-2. According to comment 2, "This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract." UCC § 2-609 cmt. 2.



reasonable grounds for insecurity are not cleared up within a reasonable time.”<sup>211</sup>

In any case where one party is uncertain of the other party's performance, section 2-609 is a “powerful statutory incorporation of self-help.”<sup>212</sup> Concern usually centers on the vague meaning of the terms.<sup>213</sup> Action by one party might give rise to “reasonable grounds for insecurity” in one case, while it does not in another.<sup>214</sup> One commentator suggests that “reasonable grounds” occur when “it is probable, but not certain, that performance will not be rendered.”<sup>215</sup> Where no reasonable grounds for insecurity exist, the party claiming

211. *Id.* Professors Calamari and Perillo comment, “[F]ailure to provide adequate assurances may create an anticipatory repudiation and thus give rise to all of the remedies available for such a repudiation. In other words this section creates a new form of repudiation.” CALAMARI & PERILLO, *supra* note 60, § 12-2 (footnotes omitted).

212. Taylor, *supra* note 153, at 883. Professor Taylor observes,

When properly applied, it operates to the advantage of both parties and is an efficient mechanism for preventing breach or minimizing total cost if breach is inevitable. In the ideal situation, seeking adequate assurances helps the [party facing breach] in one of two ways. First, if the other party fails to provide adequate assurances, the [party facing breach] has solid authority to terminate the contract. Absent the request and non-response, the [party facing breach] would have no justification to terminate unless the other party was already in total material breach, which . . . is often difficult to determine. If the other party does provide adequate assurance, the [interest of the party facing breach] in future performance is restored and it can confidently carry on with the contract. Thus, section 2-609 approves self-help to reduce uncertainty to the [party facing breach] when the status of the contract is unclear.

*Id.* at 883-84 (footnotes omitted).

213. See, e.g., *id.* at 883-87; CALAMARI & PERILLO, *supra* note 60, § 12-2; WHITE & SUMMERS, *supra* note 75, § 6-2.

214. See WHITE & SUMMERS, *supra* note 75, § 6-2. (noting that the “trier of fact must normally answer whether grounds for insecurity exist”).

215. Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 589-90 (1976); see also WHITE & SUMMERS, *supra* note 75, § 6-2; Taylor, *supra* note 154, at 886. Professors White and Summers include such illustrations for grounds of insecurity as the following:

[A] seller that stops producing the machines to be delivered under the contract; goods like those contracted for but delivered to other buyers fail to work as anticipated; seller of a boat defaults on a mortgage thereby creating a cloud on the title; seller fails to deliver goods on schedule and prompt delivery is essential; and, where the seller states that the contract price is too low to guarantee performance.

WHITE & SUMMERS, *supra* note 75, § 6-2, (citing *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563 (10th Cir. 1989); *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186 (5th Cir. 1984); *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. 1976); *Creusot-Loire Int'l, Inc. v. Coppus Eng'g Corp.* 585 F. Supp. 45 (S.D.N.Y. 1983); *Universal Builders Corp. v. United Methodist Convalescent Homes, Inc.*, 508 A.2d 819 (Conn. App. 1986)).

such grounds may not receive adequate assurances.<sup>216</sup> Where reasonable grounds for insecurity do exist, what action by the other party constitutes "adequate assurance" is another question not easily ascertainable without reference to a particular set of facts.<sup>217</sup> Moreover, a party who might have reasonable grounds for insecurity must proceed with caution because the action of suspending his own performance may itself constitute breach.<sup>218</sup>

The party uncertain about whether reasonable grounds for insecurity exist may not wish to proceed and may be unable to mitigate damages caused by an eventual breach. A minor delay in delivery (or in payment, in the case of a seller) could easily present this problem if one party indicates to the aggrieved party that performance may be delayed for a short time.<sup>219</sup> Although nothing in section 2-609 requires the aggrieved party to suspend performance, receiving adequate assurance may not provide sufficient certainty concerning the time for delivery when a delay in performance seems forthcoming. Where the perfect tender rule applies, if the other party does not perform by the date of performance,<sup>220</sup> the aggrieved party may terminate based on the breach if this suits the aggrieved party's need. However, in an installment contract, the delay must substantially impair either the value of the installment or the whole contract for the party to reject the eventual performance.<sup>221</sup>

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216. See *Cole v. Melvin*, 441 F. Supp. 193, 203 (D.S.D. 1977); *In re Coast Trading Co.*, 26 B.R. 737 (D. Or. 1982); *Turntables, Inc. v. Gestetner*, 52 A.D. 2d 776, N.Y. Supp. 2d 798 (1976); WHITE & SUMMERS, *supra* note 75, § 6-2.

217. See WHITE & SUMMERS, *supra* note 75, § 6-2.

218. See Taylor, *supra* note 153, at 884. Taylor explains,

Although section 2-609 has many benefits, it is not a perfect self-help remedy. It is a high-risk decision for a [party facing breach] to elect to seek assurances with the potential for serious consequences if the decision to do so was not justified. . . . If a [party facing breach] seeks assurances and suspends performance when not authorized to do so, its suspension may cause it to be in total material breach and liable to the other party. Therefore, it is necessary to consider when the right to seek assurances arises.

*Id.*; see also Matthew C. Brennenman, Annotation, *Sales: What Constitutes "Reasonable Grounds for Insecurity" Justifying Demand for Adequate Assurance of Performance Under UCC § 2-609*, 37 A.L.R.5th 459 (1996).

219. See *supra* notes 137-43 and accompanying text.

220. This would be determined either by the contract, or by a gap-filling provision, such as UCC § 2-309.

221. See *supra* Part IV.B.2.

*b. Interplay between § 2-609 and § 2-612.* As noted above,<sup>222</sup> a considerable amount of interplay exists between the provision granting the right to seek adequate assurance in section 2-609 and provisions found in section 2-612 dealing with installment contracts. Under section 2-612(2), even if a nonconforming delivery substantially impairs the value of the installment, the buyer may not reject the installment if the seller gives adequate assurances to cure.<sup>223</sup> Subsection (3), which determines when a breach of a whole installment contract occurs, does not contain this provision, but case law suggests a clear relationship between the provisions for demanding adequate assurance in section 2-609 and the provisions for determining breach of the whole contract under section 2-612(3).<sup>224</sup> An analysis of these cases indicates that the demand for adequate assurances may be helpful in determining whether nonperformance by one party substantially impairs the value of the installment contract, much like fixing additional time may be a prerequisite for determining fundamental breach under the CISG.<sup>225</sup>

In *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*,<sup>226</sup> no substantial impairment of an installment contract occurred when a buyer failed to pay for an installment of goods within 30 days of delivery, as required by the contract.<sup>227</sup> The contract provided that payment of a delivery was to be made within 30 days of delivery but that the course of performance between the parties indicated that payment was made consistently 90 days after shipment.<sup>228</sup> The court held that the seller waived the 30-day payment provision through its course of performance;<sup>229</sup> even if it did not, the seller would have been justified in withholding future delivery and bringing suit only if the buyer's failure to pay the installments were a substantial impairment to the whole contract.<sup>230</sup> With regard to the latter action, the court indicated the buyer's "failure to pay on thirty day terms would not con-

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222. See *supra* notes 192-208 and accompanying text.

223. See UCC § 2-612(2).

224. See WHITE & SUMMERS, *supra* note 75, § 8-3 n.12.

225. See *infra* Part V.

226. 944 F.2d 1131 (3d Cir. 1991).

227. See *id.* at 1147-48.

228. In fact, only once did Cassidy, the buyer, make payment during the 30-day window. *Id.* at 1147.

229. See *id.*

230. See *id.* at 1148.

stitute a substantial impairment of the contract unless [the seller] exercised its right to seek adequate assurance of payment.”<sup>231</sup> Since the seller did not demand adequate assurances of performance, the effect was that the seller’s withholding of delivery amounted to a breach, even though the buyer was in arrearages in payment on the contract.

A buyer who was behind in installment payments also prevailed in *Hudson Feather & Down Products, Inc. v. Lancer Clothing Corp.*<sup>232</sup> In this case, the buyer failed to make payment under the first two installments due under the contract, but the court found that the failure of payment did not result in substantial impairment of the whole contract under section 2-612(3).<sup>233</sup> Rather, the seller repudiated and did not respond to the buyer’s demand for adequate assurance of performance. The buyer was therefore entitled to cease performance and cancel the contract, per section 2-711(1).<sup>234</sup>

The seller did prevail in *Cherwell-Ralli, Inc. v. Rytman Grain Co.*,<sup>235</sup> where the court rejected the claim of the buyer, who had stopped payment on a check for an installment payment, which the seller breached by failing to provide adequate assurance.<sup>236</sup> The buyer, behind on payments, agreed to make arrearages when the seller assured the buyer that deliveries would continue.<sup>237</sup> After the buyer sent the check, a deliverer for the seller gave the buyer the indication that the seller would cease delivery. The buyer stopped payment on the check then demanded adequate assurance for future deliveries. The court flatly rejected a reasonable grounds for insecurity, noting that “[t]he buyer could not rely on its own nonpayments as a basis for its own insecurity.”<sup>238</sup> The court also suggested,

If there is reasonable doubt about whether the buyer’s default is substantial, the seller may be well advised to temporize by suspending further performance until it can ascertain whether the buyer is

231. *Id.*

232. 513 A.D.2d 674, 513 N.Y. Supp. 2d 173 (1987).

233. *See id.* at 675. The court commented that, by bringing an action only with respect to past installment payments, the seller indicated it wished to keep the contract intact, even if there was substantial impairment by the buyer.

234. *See id.*

235. 433 A.2d 984 (Conn. 1980).

236. *See id.* at 985–87.

237. *See id.* at 985. The buyer was apparently concerned that the seller’s plant was going to close, which was one reason for the nonpayment. However, the facts also indicate that the buyer had missed payments almost immediately after the contract had been consummated. *Id.*

238. *Id.* at 987.

able to offer adequate assurance of future payments. But if the buyer's conduct is sufficiently egregious, such conduct will, in and of itself, constitute substantial impairment of the value of the whole contract and a present breach of the contract as a whole.<sup>239</sup>

In each of these cases, the buyer's nonpayment almost unquestionably gives rise to reasonable grounds for insecurity, but none of these cases suggests that mere nonpayment, without more, is a substantial impairment of the whole contract. The *Cherwell-Ralli* court suggested that the seller suspend his own performance and seek adequate assurances, but the risk that suspension may result in breach is indicated by the *Cassidy Powell Lynch* case. Though the controlling facts to some degree indicate a failure on the part of a party to utilize the self-help provisions in both sections 2-609 and 2-612, these cases also illustrate the uncertainty in using these provisions.

Applying the *Nachfrist* procedure to these cases, the seller's option in the event of nonpayment could be to affix an additional amount of time for payment while continuing performance until such time arrives.<sup>240</sup> This substantially increases the level of certainty in the actions of the parties while also substantially lessening the level of risk to the party facing potential breach. As the next section suggests, however, rethinking current self-help provisions, especially the right to adequate assurance of performance, does not require eliminating existing provisions to accommodate the *Nachfrist* provision.

#### V. SUGGESTIONS FOR INCLUSION OF A *NACHFRIST* PROVISION IN THE UCC

Providing a mechanism to permit a party to fix additional time to determine for certain whether the threshold for breach has been met does not seem, on the surface, like such an intricate endeavor. A more careful consideration is required, however, to assure that *Nachfrist* would be included in a manner that would allow the procedure to facilitate continuance of contracts rather than as a mechanism fraught with uncertain application. With the provisions in the CISG

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239. *Id.* at 987 (citations omitted); see also WHITE & SUMMERS, *supra* note 75, § 8-3.

240. This would occur by using the *Nachfrist* provision for sellers similar to Article 63 of the CISG, for example. Though each of the cases analyzed in this section dealt with a buyer's delay in payment, the same problem could easily exist where a seller delayed shipment of the goods.

as guidance, this section suggests how the Code could be revised to include *Nachfrist* without substantial alteration of existing elements.

*A. Raising the Threshold for Breach*

A starting point for revision to permit successful inclusion of *Nachfrist* is elimination of the perfect tender rule in section 2-601. Though a powerful tool for a party facing a potential breach,<sup>241</sup> the restrictions placed upon its application should indicate that elevating the threshold for breach would prove difficult in terms of neither the structure of the Code nor the practical application of the code in general.<sup>242</sup> Professors White and Summers

conclude, and the cases decided to date suggest, that the Code changes and the courts' manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon "substantial" non-conformity. Of the reported Code cases on rejection, none that we have found actually grants rejection on what could fairly be called an insubstantial non-conformity, despite language in some cases allowing such rejection.<sup>243</sup>

Adoption of the threshold for breach in installment contracts—that of permitting cancellation of a contract only if a nonconformity substantially impairs the value of the contract—would closely parallel the threshold of fundamental breach in the CISG.<sup>244</sup> Even in a one-shot contract, a prospective delay in performance may not allow one party to cancel the contract if the delay does not substantially impair the value of the contract. Rather than rely solely on suspending performance and demanding adequate assurance, the party facing the delay could affix the additional time. Similar to the CISG and the UNIDROIT Principles, there seems no reason to differentiate between the application of this extension of time between buyers and sellers.<sup>245</sup>

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241. See Taylor, *supra* note 153, at 868.

242. Examples of restrictions on the application of section 2-601 include the provisions in installment contracts under section 2-612, requiring material delay or loss as grounds for rejection in an improper shipment in section 2-504, and in the more general restrictions of good faith, trade usage, course of dealing or course of performance. See WHITE & SUMMERS, *supra* note 75, § 8-3(b).

243. *Id.*

244. See *supra* Part III.A.3.

245. See CISG, *supra* note 1, arts. 47, 63.

Elevating the threshold for breach is the easy solution to incorporation. Having suggested elimination of the perfect tender rule, Professors White and Summers also recognize that most of the efforts of revision would retain this rule.<sup>246</sup> As retention is likely the case, inclusion of a *Nachfrist* procedure should revolve around the procedure's application in installment contracts. Though *Nachfrist* could be convenient in the case of a one-shot contract, its application would clearly be more effective where the threshold for breach is more uncertain. In the cases discussed above,<sup>247</sup> where a party has delayed in performance on the installment but the other party is uncertain whether reasonable grounds for insecurity exist, or whether suspending performance is proper, *Nachfrist* would provide a greater level of certainty for the aggrieved party. Moreover, a procedure for affixing additional time could also replace the provision in section 2-612(2) forbidding an aggrieved party from rejecting a single installment when the other give adequate assurances of cure.<sup>248</sup> Though *Nachfrist* should be available to facilitate all sales of goods, it should at least be available where the Code already requires substantial impairment to cancel the contract.

*B. Adopting Cooperative Provisions for Nachfrist and Adequate Assurance of Performance*

Though a provision for fixing additional time might be more appropriate in circumstances involving delay than seeking adequate assurance after suspending performance, in some—or many—situations, the conduct of one party may be sufficiently egregious to warrant the other party's suspension of performance. The CISG contains distinct provisions permitting either a *Nachfrist* notice and continued performance or, where the conduct of a party indicates "he will not perform a substantial part of his obligations," suspension of

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246. See WHITE & SUMMERS, *supra* note 75, § 8-3.

In the face of this campaign against perfect tender, both the Article 2 Study Committee and the current proposals of the Article 2 Revision Committee would retain the perfect tender rule. Particularly consumer representatives on those committees have argued for its retention. Are consumers asking for the right to return the dress with a single stitch out of place because they have found the same dress elsewhere at a lower price? For shame.

*Id.* § 8-3(b). Though this comment was in the 1995 edition, no research by this author has indicated that the proposals of the current Article 2 would eliminate the perfect tender rule.

247. See *supra* Part IV.B.2.b.

248. See UCC § 2-612(2).

performance.<sup>249</sup> The existence of these provisions in the Convention should indicate there is no reason to exclude the current section 2-609 should *Nachfrist* be included in the revised Code.

This should not indicate that section 2-609 should remain intact as it currently exists. Section 2-609 of the Code and Article 71(3) of the Convention contain parallels, but this parallelism is, in part, an illusion.<sup>250</sup> Where a party may suspend performance under section 71(1), the party “must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.”<sup>251</sup> Unlike subsection (4) of 2-609 of the Code, Article 71(3) does not permit the aggrieved party to treat a failure to provide adequate assurances as a repudiation of the contract.<sup>252</sup> Rather, section 71(3) requires the party who received adequate assurance to continue with performance.<sup>253</sup> Where adequate assurances are not received, it more likely indicates that a fundamental breach has occurred, and the party who sought adequate assurance may proceed to avoid the contract under Article 72.<sup>254</sup>

The interplay between the present section 2-609 and a provision for fixing additional time would hinge on the standard of breach adopted in the revised Article 2. If substantial impairment were adopted for all contracts governed by Article 2, the interplay would not be substantially different from that in the CISG. Section 2-609 would still require reasonable grounds for insecurity as a requisite for suspending performance and seeking adequate assurance. However, the provision in subsection (4) recognizing repudiation for failure to

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249. CISG, *supra* note 1, arts. 47, 63, 71(3).

250. See Flechtner, *supra* note 25, at 54.

251. CISG, *supra* note 1, art. 71(3).

252. See *id.*

253. See Secretariat of the United Nations, *Secretariat Commentary on Article 62 of the 1978 Draft* [draft counterpart to CISG Article 71] (visited Nov. 18, 2000) <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html>>.

[The party receiving notice of suspension] can reinstate the first party's obligation to continue performance by giving the first party adequate assurance that he will perform. For such an assurance to be 'adequate,' it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performances.

*Id.*

254. See Flechtner, *supra* note 25.



provide adequate assurance might be revised to recognize that such a failure results in a substantial impairment of the contract.

More troublesome considerations occur if the standard of breach remains the same as it exists in the current version of the Code, as indicated in the preceding section.<sup>255</sup> A suggestion permitting the inclusion of a *Nachfrist* procedure would be to include such a procedure in the provisions found in the current section 2-612. The right to adequate assurances would remain essentially intact, applying to any contract, while the *Nachfrist* procedure would help clear up uncertainty with respect to the conduct of the parties in an installment contract. While this suggestion is not the ideal solution to inclusion—especially since this author encourages adoption of a higher threshold of breach—it does provide to parties in many situations an additional and powerful option when facing a potential breach.

## VI. CONCLUSION

An overriding dilemma in seeking to implant a foreign concept into domestic law is the substantial difference in policy between the Convention and the UCC. The suggestions of raising the threshold for breach and providing procedures to aid parties resolve differences stem largely from a body of law that seeks to keep contracts intact. One might conclude that the UCC seeks not only to facilitate the sale of goods but also seeks to facilitate its breach. This conclusion is, of course, erroneous. But a suggestion on adopting a policy seeking to maintain contractual relationship at least deserves mention. Several of the sections mentioned in this Article, particularly those dealing with installment contracts and the right to demand adequate assurance, effectuate a goal of furthering continuance of a contract.<sup>256</sup>

The CISG offers opportunities to examine a piece of domestic law—though limited in application—to see how other relevant laws can be made better. Practitioners should at least take care to know the contents of the Convention. Rather than routinely opting out of the Convention for reasons of evading its provisions, practitioners should become aware of when it could be effective to facilitate the goal of the contract. In the case of the *Nachfrist* provisions in Articles 47 and 63, a practitioner should not only be aware of these provisions but should strive to understand their mechanics. A greater

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255. See *supra* Part V.A.

256. See, e.g., UCC § 2-612, cmt. 6.

use of this provision in contracts involving domestic companies could easily justify its eventual inclusion into Article 2.

The drafters of the revised Article 2 should also appreciate the opportunity the CISG provides in the design of a revised domestic sales law. Unlike drafting uniform text from scratch, the drafters can directly compare and contrast existing UCC provisions with existing and readily attainable provisions in a related sales law to see how the former could be improved. The *Nachfrist* provisions are a clear example of an existing piece of the Convention that should be utilized in the revised version. Consideration of the *Nachfrist* provisions should also lead the drafters to consider the CISG on a larger scale, recognizing that the policy of keeping contracts intact is beneficial to commercial exchange. In sum, the CISG permits the drafters of the Code to examine closely revisions to the existing sales law without requiring them to forsake other alternatives.

